IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-99

OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR THE TEXAS ASSOCIATION OF BUSINESS

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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE FOR THE TEXAS ASSOCIATION OF BUSINESS

Pursuant to Rule 42(3) of the Rules of this Court, the Texas Association of Business respectfully moves for leave to file the attached brief amicus curiae in this case in support of the position of Petitioner. Counsel for the amicus has sought the consent of the parties involved: attorneys for the Petitioner refused, the attorneys for Respondent consented to the filing of this amicus brief.

INTERESTS OF THE AMICUS

1. The amicus here is an association representing approximately four thousand businesses in the State of Texas. The vast majority of these businesses employ more than fifteen employees in industries affecting commerce and are thus subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* Established in 1922, the Texas Association of Business, formerly the Texas Manufacturers' Association, is a statewide alliance of businesses working to strengthen the economy and to ensure a reasonable balance of governmental regulation of business in Texas and the nation to protect the public interest by maintaining the health of the free enterprise system.

2. The amicus and its members have a particularly vital interest in the issues presented here. Many of its members have been the subject of charges filed with the Equal Employment Opportunity Commission which have been subjected to administrative delays of varying length. These delays have frustrated the conciliation process mandated by Title VII and have prejudiced the litigation positions of several member businesses. Some of its members are currently in litigation with the EEOC in which the issue of prejudicial administrative delays by the EEOC has been raised. *E.g.*, *EEOC* v. *Texas Instruments Incorporated*, Civil Action No. 3-75-1093G (N.D. Texas, Dallas Division) (pending). Resolution of the present issues is therefore of vital concern to the amicus because the business condition and litigation posture of many of its members will be substantially affected by the outcome of this case.

3. The essential issue presented by this case is whether there is any time limit applicable to the EEOC's power to file suit under Title VII. The effect of the decision

below is that there is no such time limit, no matter how long or unreasonable the delay and no matter how extreme the prejudice to the opposing party. This decision conflicts with the decisions of the Fifth Circuit in *United States* v. *Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973) and in *Equal Employment Opportunity Commission* v. *Griffin Wheel Company*, 511 F.2d 456, *clarified*, 521 F.2d 223 (5th Cir. 1975), which govern the federal district courts having jurisdiction over the amicus and its member businesses.

4. The amicus believes that the parties in their briefs below, and in their certiorari papers to this Court, did not adequately present several questions. First, the parties did not fully explicate the public policies of fairness and repose served by statutes of limitations and relate those policies to the essential issue presented here. Since the delays of the EEOC have arisen in many factual contexts quite different from those in which Petitioner's case developed, the amicus urges that it, as the representative of a broad group of employers subject to Title VII, is especially qualified to assist the Court in representing the broad range of interests and factual patterns affected by the important issues raised in this case.

Second, the parties failed to analyze correctly and distinguish between the immunity allowed the government in a suit affecting sovereign rights as opposed to a government suit as a conduit to affect private rights. Finally, the parties have totally failed to address the application of laches which, as one court has found,[1] presents questions of fact and law intrinsically inter-

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[1] See EEOC v. Griffin Wheel Co., 511 F.2d 456, clarified, 523 F.2d 223 (5th Cir. 1975); United States v. Georgia Power Co., 474 F.2d 906, (5th Cir. 1973). See also, EEOC v. C & D Sportswear Corp., 398 F. Supp. 300 (M.D. Ga. 1975) [no appeal taken].

twined with the questions raised here, and full analysis of these issues necessarily requires its consideration.

CONCLUSION

For the foregoing reasons, the amicus herein respectfully requests the Court to grant this motion for leave to file the attached brief amicus curiae in support of the position of Petitioner.

Respectfully submitted,

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BRIEF AMICUS CURIAE FOR THE TEXAS ASSOCIATION OF BUSINESS

INTERESTS OF THE AMICUS

This brief is submitted pursuant to Rule 42 of the Rules of this Court, subject to the Court's granting of the attached Motion for Leave to File a Brief as Amicus Curiae. The amicus herein supports the position of the Petitioner in this case, urging reversal of the decision by the United States Court of Appeals for the Ninth Circuit. *Occidental Life Insurance Co. of California* v. *EEOC*, 535 F.2d 533 (1976).

The interests of the amicus are stated in the attached Motion (*supra*, pp. (1)-(4)), and are not repeated herein.

ARGUMENT

ESTABLISHED LEGAL PRINCIPLES AS WELL AS CONSIDERATIONS OF PUBLIC POLICY REQUIRE REVERSAL OF THE DETERMINATION BELOW THAT THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION HAS INFINITE TIME WITHIN WHICH TO BRING A LAWSUIT UNDER TITLE VII.

Introduction And Summary Of Argument

The essential question presented here is whether the EEOC has infinite time within which to bring a suit under Section 706 of Title VII of the Civil Rights Act of 1964,[1] or conversely, whether the EEOC must file its lawsuit within time constraints required by Congress or by traditional concepts of fairness and justice which prevent litigation of claims brought after relevant evidence is lost or blurred due to the passage of time.

The court below, expressly disagreeing with the decisions of the Fifth Circuit,[2] found that the EEOC's right to sue is subject to no time limitation whatsoever. This decision, if upheld by this Court, would permit EEOC prosecution of suits filed many years after the most liberal statute of limitations would have expired. Such suits are common under current EEOC practice.[3]

The decision of the court below is plainly wrong. The statutory scheme and legislative history show that Con-

[1] 42 U.S.C. § 2000e-5 (1970).

[2] United States v. Georgia Power Co., 474 F.2d 906, 922-924 (5th Cir. 1973); EEOC v. Griffin Wheel Co., 511 F.2d 456, 458, clarified, 521 F.2d 223 (5th Cir. 1975).

[3] See cases cited at note 9, *infra*, representative of the routine of lengthy Commission delays.

gress intended to limit the EEOC's power to sue to a period within 180 days after the filing of a proper charge.[4] Even if the 180 day limit is not accepted by this Court, established legal principles require that the EEOC's right to sue be limited by the appropriate state statutes of limitations. This Court has repeatedly held that when there is no express statute of limitations applicable to a federal cause of action, the action must be filed within the most appropriate limitations period provided by state law.[5] Employment discrimination cases present no reason to alter this rule, as this Court recently held in an employment discrimination suit brought under 42 U.S.C. § 1981. *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975). Moreover, considerations of public policy support the application of state statutes of limitations to EEOC suits under Title VII. The policies of fairness and repose embodied in statutes of limitation are as applicable to Title VII suits as they are to any other litigation. This Court has indicated that considerations of prejudice, which underlie statutes of limitations, may justify denial of backpay in a Title VII case, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 424 (1975), and has also recognized that the EEOC's administrative record in the handling of Title VII charges shows a proclivity toward "significant delay." *Johnson* v. *Railway Express Agency*, *supra*, 421 U.S. at 465 n.11. Such delay vividly illustrates the necessity for providing some limitation period within which the EEOC must act. And, application of statutes of limitation to the

[4] This issue of statutory construction was ably and forthrightly presented by Petitioner Occidental Life in the court below. We do not further argue that point in this brief, but adopt the position set forth in Petitioner's brief. We reserve our arguments herein for issues where our experience and exposure can present matters for the Court's consideration beyond the arguments we anticipate Petitioner Occidental Life will raise.

[5] See text at pp. 5-7, *infra*.

EEOC fully serves the congressional intent for expeditious enforcement of Title VII.

The Court of Appeals below failed to take the public interests embodied in a statute of limitations into consideration, ruling instead that because the EEOC is a government agency it is not subject to the general rule requiring application of state limitations periods. However, analysis shows that the court's conclusion is without basis in law and is not supported by policy. The governmental immunity on which the court relied is available only when the government sues to preserve the public treasury and property, and has been expressly withheld where the government is suing on behalf of private individuals. The interests asserted by the EEOC in an action under Section 706 of Title VII are clearly not of the sort historically entitled to immunity from limitations. This Court's characterization of the public interest served by the availability of an effective remedy once liability has been established is not to the contrary. Furthermore, proper analysis of certain "practical considerations" offered by the court below to support its ruling shows that those considerations are, in fact, far more persuasive of the need for application of a limitations period. Consideration of the court's list of factors in light of the policies underlying Title VII and statutes of limitations compels the conclusion that limitations periods are the only effective means of serving both interests simultaneously.

Finally, the amicus believes that analysis of the doctrine of laches is necessary for the Court's full understanding and consideration of the issue of time limitations on the EEOC. The issue of laches was not raised in the court below. *Occidental Life Insurance Co. of California* v. *EEOC*, 535 F.2d 533, 540 n.12 (9th Cir. 1976). However, the doctrine of laches is applicable under Title VII, as the Fifth Circuit has expressly noted

in both *United States* v. *Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973) and in *EEOC* v. *Griffin Wheel Co.*, 511 F.2d 456, *clarified*, 521 F.2d 223 (5th Cir. 1975). The doctrine is fully applicable to the EEOC where it has engaged in unreasonable delay to the prejudice of the opposing litigant.

These reasons conclusively establish that the decision of the court below is plainly wrong, and that established judicial authority requires the imposition of state statutes of limitations and laches to limit the time within which the EEOC may file a suit under Title VII.

I.

Established Legal Principles Require That State Statutes Of Limitations Be Applied To EEOC Actions Under Title VII.

This Court has frequently held that where "there is no specifically stated or otherwise relevant federal statute of limitations . . . the controlling period would ordinarily be the most appropriate one provided by state law." *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975) (Civil Rights Act of 1866). See *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 703-04 (1966) (Labor Management Relations Act); *Cope* v. *Anderson*, 331 U.S. 461, 463 (1947) (National Bank Act); *O'Sullivan* v. *Felix*, 233 U.S. 318, 322 (1914) (Civil Rights Act of 1871); *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390, 397 (1906) (Sherman Act). This result follows the congressional policy embodied in the Rules of Decision Act, 28 U.S.C. § 1652,* which provides that

> the laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be re-

* 62 Stat. 944 (1948), formerly R.S. Sec. 721.

> garded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Citing this statute, this Court long ago established that "cases where they apply" include federal causes of action for which Congress has not expressly provided a federal statute of limitations. *Campbell* v. *City of Haverhill*, 155 U.S. 610, 614-15 (1895); *McClaine* v. *Rankin*, 197 U.S. 154, 158 (1905); *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, *supra*, at 397. This rule applies whether the federal cause of action asserted is equitable or legal in nature. *Johnson* v. *Railway Express Agency, Inc.*, *supra*, at 460; *Cope* v. *Anderson*, *supra*, at 463-64. Its force is limited only where the application of state limitations would be inconsistent with the federal policy underlying the cause asserted,[7] which, as we demonstrate in Parts II and III below, is not the case here.

The justification for applying state statutes of limitations to federal causes of action was expressed in *Campbell* v. *Haverhill*, *supra*, at 616-17, where this Court ruled that state statutes of limitations apply to suits for infringement under the federal Patent Act:

> Unless this be the law, we have the anomaly of a distinct class of actions subject to no limitation whatever; a class of privileged plaintiffs who in this particular, are outside the pale of the law, and subject to no limitation of time in which they may institute their actions. . . . As was said by Chief Justice Marshall in Adams v. Woods, 6 U.S. (2 Cranch) 336, 342 of a similar statute: "This would be utterly repugnant to the genius of our laws. In a country within which not even treason can be prosecuted after the lapse of three years, it can scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture."

[7] Johnson v. Railway Express Agency, Inc., *supra*, at 465; Auto Workers v. Hoosier Cardinal Corp., *supra*, at 706-07.

The congressional power to overrule such an interpretation of its silence only confirms the general propriety of this judicial practice. See *Auto Workers* v. *Hoosier Cardinal Corp.*, *supra*, 383 U.S. at 704.

In an action under 42 U.S.C. § 1981, this Court has recently recognized that there is nothing peculiar to a federal civil rights action that would justify special reluctance in applying state statutes of limitations. *Johnson* v. *Railway Express Agency, Inc.*, *supra*, 421 U.S. at 464. Indeed, this Court in *Johnson* suggested that application of state statutes of limitations in employment discrimination suits is especially appropriate in light of 42 U.S.C. § 1988, which parallels the Rules of Decision Act in providing that state law shall apply in cases under certain civil rights laws where there is no federal law to apply.[8] Since federal causes of action under Title VII vindicate the same interests as are involved in an action under 42 U.S.C. § 1981, consistent application of federal law requires that state statutes of limitations be applied to EEOC actions under Title VII.

II.

Public Policy Dictates The Application Of State Statutes Of Limitations To EEOC Actions Under Title VII.

Not only does the application of established federal law require that state statutes of limitation be applied to

[8] 42 U.S.C. § 1988 provides:

> The jurisdiction . . . conferred . . . by . . . this chapter and Title 18, for the protection of . . . civil rights . . . shall be exercised and enforced in conformity with the laws of the United States . . .; but in all cases where they are not adopted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified . . . of the State wherein the court . . . is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in disposition of the cause. . . .

EEOC actions under Title VII but consideration of public policy dictates that result as well. We show below that application of state statutes of limitations is required by the policies of fairness and repose which underlie statutes of limitation and is entirely consistent with the salutary policies underlying Title VII. We also show that application of state statutes of limitations to bar unseasonable claims by the EEOC serves the ultimately more important public interest in having the outcome of litigation determined by the merits of the controversy rather than the accumulated advantage that accrues to the government as the passage of time makes defense more difficult.

A. *The Public Policies Of Fairness And Repose Underlying Statutes Of Limitations Are Applicable To Title VII Actions.*

A statute of limitations is a legislative determination that at some point the societal interest in fairness to a defendant outweighs the societal interest in resolution of stale claims. This determination is founded on the presumption that prejudice necessarily flows from delay in pressing a claim. This Court has so recognized, stating that a statute of limitations is designed

> to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Order of Railroad Telegraphers v. *Railway Express Agency*, 321 U.S. 342, 348-49 (1944). To this effect, this Court has said: "Statutes of limitations are primarily designed to assure fairness to defendants." *Burnett* v. *New York Central R. Co.*, 380 U.S. 424, 428 (1965). Fairness to defendants necessarily includes notice that a claim is asserted. Statutes of limitations assure such fairness by requiring that a claim be asserted in a timely fashion. Such notice prevents prejudice by the loss or erosion of evidence, enabling the defendant to preserve his evidence. Yet notice alone does not suffice, for there is much evidence that no defendant is able to preserve. Fairness also entails repose, the need to avoid perpetual jeopardy for one who was once upon a time given notice that he "might" be subject to suit at some indefinite time in the future. "[I]t can scarcely be supposed that an individual would remain forever liable . . . ." *Adams* v. *Woods*, 6 U.S. (2 Cranch) 336, 342 (1805).

This Court has recognized that the policies of fairness and repose are applicable under Title VII. In *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), the plaintiffs had not asserted their claim for backpay until five years after filing their lawsuit, which delay allegedly prejudiced the defendant. The Court held that prejudicial delay might, in the exercise of the Court's discretion, justify denial of backpay:

> A party may not be "entitled" to relief if its conduct of the cause has improperly and substantially prejudiced the other party. . . . To deny backpay because a *particular* cause has been prosecuted in an eccentric fashion, prejudicial to the other party, does not offend the broad purposes of Title VII. 422 U.S. at 424 (emphasis in original).

Thus the public policies underlying statutes of limitations have been recognized by this Court as applicable to Title VII actions.

Examination of the EEOC's record to date in enforcement of Title VII demonstrates the compelling need to

establish standards of fairness and repose applicable to the EEOC. The cases are now legion in which the EEOC has attempted to revive claims as much as six years old that have been allowed to "slumber."[9] Such delay is inherently prejudicial to a defendant for, inevitably, the older the charge the more difficult will be the preparation of a defense. This is true whether the delay is due simply to administrative backlog and inefficiency or to a strategic decision, such as a concerted strategy of accumulating individual charges to improve the EEOC's evidentiary position. Such prejudice may result from the destruction of records,[10] the fading memory of an em-

[9] See EEOC v. American Nat. Bank, 420 F. Supp. 181 (E.D. Va. 1976) (six years, six months); EEOC v. Joint Apprenticeship Committee, 7 EPD ¶ 9334 (N.D. Cal. 1974) (six years); EEOC v. Universal Warehouse Co., 11 EPD ¶ 10,658 (W.D. Tenn. 1975) (six years). See also EEOC v. Christianburg Garment Co., 367 F. Supp. 1067 (W.D. Va. 1974) (five years, seven months); EEOC v. C & D Sportswear Corp., 398 F. Supp. 300 (M.D. Ga. 1975) (five years, six months); EEOC v. Bartenders International Union, 369 F. Supp. 827 (N.D. Cal. 1973) (five years, three months); EEOC v. Moore Group, Inc., 11 EPD ¶ 10,886, on rehearing, 416 F. Supp. 1002 (N.D. Ga. 1976) (five years, one month); EEOC v. American Machine & Foundry, Inc., 12 EPD ¶ 11,200 (M.D. Pa. 1976) (four years, ten months); EEOC v. Union Oil Co., 369 F. Supp. 579 (N.D. Ala. 1974) (four years, seven months); EEOC v. Eagle Iron Works, 367 F. Supp. 817 (S.D. Iowa 1973) (four years, three months); EEOC v. J.C. Penney Company, Inc., 11 EPD ¶ 10,661 (N.D. Ala. 1975) (four years, one month).

[10] See EEOC v. American Machine & Foundry, Inc., 12 EPD ¶ 11,200 at 5525-26, (M.D. Pa. 1976) (Defendant found to be prejudiced by EEOC delay where it properly destroyed records four and one-half years after filing of charge with EEOC and two years after last contact from EEOC); EEOC v. Moore Group, Inc., 11 EPD ¶ 10,886, on rehearing 416 F. Supp. 1002 (N.D. Ga. 1976) (Defendant found to be prejudiced by EEOC delay where it properly destroyed records five years after filing of charge with EEOC and one and one-half years after last contact from EEOC); cf. EEOC v. Joint Apprenticeship Committee, 7 EPD ¶ 9334 (N.D. Cal. 1974) (Defendant held required to preserve records six years after filing of charge with EEOC). Even the charging party might destroy his relevant records. See EEOC v. American Nat. Bank, 420 F. Supp. 181, 187 (E.D. Va. 1976).

EEOC regulations, 29 C.F.R. § 1602.14, provide that an employer may dispose of records in the ordinary course of business after six months, except where a charge has been filed or a civil action brought under Title VII, in which event all relevant personnel records must be preserved until the expiration of the aggrieved person's right to sue (90 days after EEOC determination of "cause" or "no cause") or, where suit has been brought, until termination of the lawsuit. It has been held that if the aggrieved person's right to sue has expired and no action has been brought, the employer is free under the regulations to dispose of his records. EEOC v. American Machine & Foundry, Inc., 12 EPD ¶ 11,200 (M.D. Pa. 1976); EEOC v. Moore Group, Inc., 11 EPD ¶ 10,886, on rehearing, 416 F. Supp. 1002 (N.D. Ga. 1976).

[11] See EEOC v. C & D Sportswear Corp., 398 F. Supp. 300, 302 (M.D. Ga. 1975) (Defendant found to be prejudiced by five and one-half year delay in light of age (70) of Defendant's chief witness); EEOC v. American Nat. Bank, 420 F. Supp. 181, 187 (E.D. Va. 1976) (six year delay found prejudicial to Defendant in light of age (72) of an important witness).

[12] See EEOC v. Moore Group, Inc., 11 EPD ¶ 10,886, on rehearing, 416 F. Supp. 1002 (N.D. Ga. 1976) (Defendant found to be prejudiced by five year delay when employee-witness left employment in the interim and records properly destroyed); EEOC v. American Nat. Bank, 420 F. Supp. 181, 187 (E.D. Va. 1976) (Defendant found to be prejudiced by six-year delay when three important witnesses had left its employ).

[13] This requirement was added on the floor of the House of Representatives after a finding that the EEOC's prior failure to give such notice "violates all concepts of due process." See H.R. Rep. No. 92-238, 92nd Cong., 1st Sess., at 66 (1971) (Minority Report).

ployee,[11] or the loss of other evidence such as the personal testimony of former employees who may not be located or whose testimony or cooperation may not be available.[12]

The prejudicial loss of evidence results in part from the lack of any notice requirements for EEOC lawsuits under Title VII. In the EEOC's practice, notice seems to be a concept of flexible expediency rather than one of fundamental fairness. The 1972 amendments to Title VII added a requirement that an employer receive prompt notice of a charge filed against it.[13] That notice, how-

ever, does not purport to advise the employer of all the issues that may be raised in a subsequent lawsuit, as the *Occidental* case graphically illustrates.[14] Indeed, the EEOC has been allowed by the lower courts to sue on issues far beyond those alleged in the charge. See *EEOC* v. *General Electric Co.*, 532 F.2d 359, 366 (4th Cir. 1976). While the conciliation process *may* provide timely notice of the issues, there are countless cases where even this process has been delayed for years after the filing of charges.[15] Thus an employer may not be aware of the potential issues in a lawsuit for several years *after* a charge is filed with the EEOC. During this time the employer has no idea at all what witnesses or records may be relevant to the as yet undisclosed issues.[16] The

[14] 535 F.2d at 540-42.

[15] See, e.g., EEOC v. American National Bank, 420 F. Supp. 181 (E.D. Va. 1976) (four years, eleven months after charge to completion of investigation); EEOC v. Universal Warehouse Co., 11 EPD ¶ 10,658 (W.D. Tenn. 1975) (three years, eleven months); EEOC v. C & D Sportswear Corp., 398 F. Supp. 300 (M.D. Ga. 1975) (two years, nine months); EEOC v. Moore Group, Inc., 11 EPD ¶ 10,886, on rehearing, 416 F. Supp. 1002 (N.D. Ga. 1976) (two years, seven months).

[16] The Court below expressly found that Occidental received "adequate notice" of the new issues which were not included in the original charge but were raised by the EEOC after its investigation. The Court found that adequate notice was provided because reference was made to those issues in the District Director's Findings of Fact (February 25, 1972) and in the EEOC's Determination of Reasonable Cause (February 8, 1973). Yet backpay liability on all issues raised in the EEOC's lawsuit extends back to March 9, 1969, two years prior to the filing of the original charge. Thus Occidental had accumulated three years of backpay liability on the new issues before receiving notice of those issues. Even so, Occidental's case is a favorable one on the facts for the EEOC, for the one year delay from the filing of the charge to the Findings of Fact is minor delay compared to the EEOC's performance in other cases. See, e.g., cases cited in note 15, *supra*. While the EEOC investigation may in some instances give the employer a general indication of the issues likely to be raised, where the EEOC demands voluminous documents and statistics, the employer has no indication which specific issues are the focus of the investigation until he is notified by the EEOC.

employer is not only unaware of the issues during this time, but is also unaware of which *employees* may be involved in the case, for the EEOC often sues on behalf of a broad class of employees not named in the charge; *e.g.*, in *Occidental* a charge of sex discrimination in maternity policies was expanded to include male employees allegedly victimized by discrimination in administration of the retirement system. Moreover, even where conciliation provides notice of the potential issues, once an aggrieved person has received a determination on his charge and then allowed his right to sue to expire, an employer may receive no notice at all that the EEOC may yet sue him on the same charge several years later.[17] Thus in the EEOC's practice there is no sure repose for an employer once charged with discrimination. There is, rather, perpetual jeopardy.

This Court has recognized the EEOC's record of "significant delays." *Johnson* v. *Railway Express Agency, Inc.*, *supra*, 421 U.S. at 465, n.11. In light of that record Title VII cases brought by the EEOC are often those very cases in which "notice to defend" is absent or inadequate or which "have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." Such factors are the very reasons for a statute of limitations. Their recurrence in EEOC actions under Title VII vividly illustrates the need for a statute of limitations on such EEOC actions. Just as *Moody* held that prejudicial delay in asserting a backpay claim would justify denial of backpay, so also where delay in filing the lawsuit would be prejudicial to defense on the merits, the entire suit should be barred.

[17] See EEOC v. C & D Sportswear Corp., 398 F. Supp. 300 (M.D. Ga. 1975); EEOC v. Christianburg Garment Co., 367 F. Supp. 1067 (W.D. Va. 1974); EEOC v. American Machine & Foundry, Inc., 12 EPD ¶ 11,200 (M.D. Pa. 1976); EEOC v. Moore Group, Inc., 11 EPD ¶ 10,886, on rehearing, 416 F. Supp. 1002 (N.D. Ga. 1976).

As discussed in detail below (pp. 24-26, *infra*), application of a statute of limitations will in no way detract from the salutary deterrent purposes of Title VII. Neither will application of a statute of limitations detract from the "make-whole" purposes of Title VII, for in addition to a timely EEOC lawsuit, the statutory scheme also allows the charging party to pursue his own lawsuit with statutory authorization for appointed counsel [18] and recovery of costs and attorneys' fees.[19] Application of a statute of limitations will simply prevent the litigation of stale claims and at the same time control the unbridled discretion and interminable delays of the EEOC, which result will benefit charging parties, respondent-employers and the public interest.[20] As the court stated in *EEOC* v. *American National Bank*, 420 F. Supp. 181, 184-85 (E.D. Va. 1976):

> Unconscionable delay in proceedings under Title VII not only disserves the policy of ending discrimination while leaving the alleged victim of discrimination without relief, but also the parties charged are left in the Damoclean situation of never knowing when an old charge may spring back into life as the basis of a lawsuit against it [sic]. The proper functioning of administrative agencies and the proper relationship between a government and its citizens, individual and corporate, should not allow the unending possibility of litigation on forgotten matters. [footnote omitted]

[18] § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1).

[19] § 706(k), 42 U.S.C. § 2000e-5(k).

[20] Just as in Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 467, n.13 (1975), it cannot be overemphasized "how little is at stake here." As there, the issue is not whether employers can be compelled to adhere to Title VII, for if they are presently engaged in conduct which violates Title VII, either the charging party or the EEOC itself can file a *new* charge under Title VII. The question in this case is only whether a particular charge has been held so long by the EEOC that its assertion would prejudice a defendant and burden the courts with stale claims.

In the absence of any time limitation whatsoever on EEOC actions under Title VII, there will undoubtedly be cases [21] in which the delay is so unreasonable and the prejudice so extreme that to allow the suit would "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples," *Malinski* v. *New York*, 324 U.S. 401, 417 (1945), and thus constitute a denial of due process of law to the defendant. It is for just such reasons that the absence of any statute of limitations has long been recognized as "utterly repugnant to the genius of our laws." *Adams* v. *Woods*, 6 U.S. (2 Cranch) 336, 342 (1805).

B. *Application Of State Statutes Of Limitations Is Required By The Congressional Policy For Expeditious Action Under Title VII.*

In drafting Title VII Congress clearly contemplated expeditious action to resolve charges of employment discrimination. Title VII contains seven specific time limits [22] on enforcement action, none longer than 180 days. It also contains an express command to the judiciary that Title VII cases are "to be in every way expedited," [23] and a requirement that the EEOC "shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge

[21] Such cases may have already arisen. See notes 10-12, *supra*.

[22] Charges must ordinarily be filed with the EEOC within 180 days after the event; § 706(e): the EEOC must provide notice to the employer within ten days after the charge is filed, § 706(b); mandatory deferral to the authority of an appropriate state agency is required for at least 60 days, § 706(c) and (d), but not more than 300 days, § 706(e); the EEOC may bring an action only upon expiration of 30 days after a charge is filed, § 706(f)(1); the aggrieved person may bring an action if the EEOC has not conciliated, dismissed, or sued upon his charge within 180 days of its filing, § 706(f)(1), but may only do so during a 90 day period.

[23] § 706(f)(5), 42 U.S.C. § 2000e-5(f)(5).

. . . ."[24] It is implausible to argue that with this emphasis on expedition evident throughout the statute Congress intended that the EEOC would be free to delay its filing of lawsuits for as long as six years.[25] Rather, the only inference consistent with this emphasis on expedition is the traditional inference that in the absence of an express federal limitation the appropriate state statute of limitations applies.[26] *Johnson* v. *Railway Express Agency, supra; O'Sullivan* v. *Felix, supra; Auto Workers* v. *Hoosier Cardinal Corp., supra.* This rule is so well established that Congress must be presumed to have been on notice of it. See *Auto Workers* v. *Hoosier Cardinal Corp., supra,* 383 U.S. at 704; *United States* v. *Minker,* 350 U.S. 179, 188 (1956); *United States* v. *Neustadt,* 366 U.S. 696, 707 (1961); *T.I.M.E.* v. *United States,* 359 U.S. 464, 473 (1959). Where Congress gave no indication contrary to this well-established rule, and where its application is consistent with the statutory scheme and purposes, the traditional rule must be applied.

III.

The Ninth Circuit's Reasons For Not Applying State Statutes Of Limitations To Suit By The EEOC Are Not Supported By Law Or Policy.

Ignoring the policies of fairness and repose on which the application of statutes of limitations is based, the

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[24] § 706(b), 42 U.S.C. § 2000e-5(b).

[25] See note 9, *supra.*

[26] Although the applicable state statutes of limitations vary, this variance alone is no reason to render such state statutes inapplicable to federal civil rights actions. Johnson v. Railway Express Agency, 421 U.S. 454, 464. Nor are the one year statutes necesarily "too short" for Title VII purposes. Significantly, Congress itself expressly limited private lawsuits to a 90 day period, which has been strictly applied. International Union of Electrical, Radio & Machine Workers v. Robbins & Myers, Inc., —— U.S. ——, 97 S.Ct. 441 (1976). Of course, Congress remains free to establish a uniform and definite statute of limitations in Title VII.

Court of Appeals in its decision below ruled that suit by the EEOC promotes a "public" interest and therefore is not subject to the same restrictions as apply to the protection of merely "private" rights. The court's distinction between public and private lawsuits was premised (1) on the historic immunity enjoyed by the sovereign when suing to enforce its own rights, and (2) on a comparison of the roles of the EEOC and the National Labor Relations Board (NLRB) in implementing the public policies with which each agency is concerned. We show below in Part A that the Ninth Circuit erroneously failed to recognize that the interests asserted by the EEOC are not of the sort entitled to the sovereign exception, that the analogy to the NLRB is inapposite, and that the court confused the public interest in an effective remedy under Title VII with the public interest in suit being brought at all. Finally, we show in Part B that certain "practical considerations" suggested by the Court of Appeals, rather than supporting its conclusion, confirm the need for application of a limitations period.

A. *The Ninth Circuit Erred In Concluding That EEOC Lawsuits On Behalf Of Private Individuals Are Not Subject To Limitations.*

1. *The Immunity From Limitations Ordinarily Due The Sovereign Is Inapplicable.*

The Ninth Circuit ruled that because suit by the EEOC promotes the public interest in ending discrimination, the EEOC is entitled to the immunity ordinarily due the sovereign when it sues to preserve its own rights. That the government is immune from the limitations defense when it sues to enforce rights vested in it as a sovereign has been, to be sure, often acknowledged by this Court. See, *e.g., United States* v. *Summerlin,* 310 U.S. 414 (1940), and cases cited therein. However, the de-

cisions also recognize that the government often sues, not to assert its own interests, but to assert the interests of private individuals; and in such cases the immunity ordinarily due the sovereign has not been extended. The distinction was expressly noted in *United States* v. *Des Moines Navigation & Railway Co.*, 142 U.S. 510, 538-39 (1892):

> While it is undoubtedly true that when the government is the real party in interest, and is proceeding simply to assert its own rights and recover its own property, there can be no defense on the ground of laches or limitation, *United States* v. *Nashville, C. & St. L. R. Co.*, 118 U.S. 120, 125; *United States* v. *Insley*, 130 U.S. 263; yet it has also been decided that where the United States is only a formal party, and the suit is brought in its name to enforce the rights of individuals, and no interest of the government is involved, the defense of laches and limitation will be sustained as though the government was out of the case, and the litigation was carried on in name, as in fact, for the benefit of private parties. *United States* v. *Beebe*, 127 U.S. 338.

See *United States* v. *American Bell Telephone Co.*, 167 U.S. 224 (1897); *Curtner* v. *United States*, 149 U.S. 662 (1893); *San Pedro & Canon Del Aqua Co.* v. *United States*, 146 U.S. 120, 135 (1892) (". . . it is well settled that when the government has a direct pecuniary interest in the subject matter of the litigation the defenses of stale claim and laches cannot be set up as a bar."); cf. *La Republique Francaise* v. *Saratoga Vichy Spring Co.*, 191 U.S. 427 (1903). In *United States* v. *Beebe*, 127 U.S. 338, 346-47 (1888), this Court demonstrated the sort of inquiry necessary to determine if the government's interest falls within the sovereign privilege:

> [A]n inspection of the record show [sic] that the Government, though in name the complainant, is not the real contestant party to the title or property in

> the land in controversy. It has no interest in the suit, and has nothing to gain from the relief prayed for, and nothing to lose if the relief is denied. The bill itself was filed in the name of the United States, and signed by the attorney-general, on the petition of private individuals; and the right asserted is a private right, which might have been asserted without the intervention of the United States at all.
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> * * * *
>
> We are of the opinion that when the Government is a mere formal complainant in a suit, not for the purpose of asserting any public interest, title, or property, but merely to form a conduit through whom one private person can conduct litigation against another private person, a court of equity will not be restrained from administering the equities existing between the real parties by any exemption of the Government designed for the protection of the rights of the United States alone. The mere use of its name in a suit for the benefit of a private suitor cannot extend its immunity as a sovereign government to said private suitor, whereby he can avoid and escape the scrutiny of a court of equity into the matters pleaded against him by examining into and deciding the case according to the principles governing courts of equity in like cases between private litigants.

Measurement of the EEOC lawsuit under Section 706 against this standard demonstrates that the government's interest in such a suit is not of the sort required to invoke sovereign immunity from the limitations defense. Suit under Section 706 is not tied to the EEOC's conception of the general public interest, but to a charge filed by an individual. The EEOC has no right to sue under Section 706 independent of the charge filed by a person claiming to be aggrieved.[27] And it has no exclusive right

[27] Sec. 706(f)(1), 42 U.S.C. § 2000e-5(f)(1). *Compare* Section 706 *with* Section 707, 42 U.S.C. § 2000e-6. Unlike Section 706,

to sue on the charge once it is filed, for the statute permits the charging party to sue on his own behalf.[28] If the EEOC does bring suit, it can seek relief no broader than that available to the charging party suing on his own behalf.[29] In fact, the relief available under Title VII is less extensive than that available under the Civil Rights Act of 1866, 42 U.S.C. § 1981, which this Court has already held subject to a state limitations period. *Johnson* v. *Railway Express Agency, supra.* While it may be that the public's interest in the vindication of private rights is generally served by an EEOC suit, just as it is served when any legislative pronouncement is enforced, *Johnson* clearly shows that that interest is not so great as to be immune from the public interest embodied in statutes of limitations. The Ninth Circuit completely ignored the teaching of *Johnson* with the glib statement that "this case involves a public agency enforcing Title VII rights." 535 F.2d at 539. However, just as the United States government in *Beebe* was not the real party in interest to the suit, so too the EEOC in a Title VII action "though in name the complainant, is not the real contestant party. . . ." The EEOC has "nothing to gain from the relief prayed for, and nothing to lose if the relief is denied." Furthermore, the right asserted by the EEOC "is a private right, which might have been asserted without the intervention of the United States at all." Consequently, the "mere use of [the EEOC's] name . . . cannot . . . stop the court from examining into and deciding the case according to the principles governing courts of equity in like cases between private litigants."

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which is keyed entirely to the filing of a charge, Section 707 provides for a "pattern or practice" suit upon certification that the case is of general public importance.

[28] Sec. 706(g), 42 U.S.C. § 2000e-5(g).

The correct understanding of the EEOC's interest in a Section 706 action was evinced by the Court of Appeals for the Fifth Circuit in *EEOC* v. *Griffin Wheel Co.*, 511 F.2d 456, *clarified*, 521 F.2d 223 (5th Cir. 1975). Drawing from its earlier decision in *United States* v. *Georgia Power Co.*, 474 F.2d 906, 923 (5th Cir. 1973), the court quoted:

> Where the government is suing to enforce rights belonging to it, state statutes of limitation are not applicable . . . . However, this principle is not apropos to the present back pay claim. Insofar as the pattern or practice suit constitutes a proper legal conduit for the recovery of sums due individual citizens rather than the treasury, it is a private and not a public action . . . . These personal claims are entitled to no superior status because they are here allowed to be asserted in the Attorney General's suit as well as in the private class action.

511 F.2d at 458-59 (citations omitted).[30] The Fifth Circuit's characterization of the government's interest in a lawsuit under Title VII accords entirely with the concept of public interest expressed in *Beebe* and similar cases. The Ninth Circuit's conclusory rejection of the Fifth Circuit's analysis was therefore clearly in error.

2. *The Comparison To The NLRB Is Inapposite.*

The Ninth Circuit also drew on two decisions under the National Labor Relations Act to show that the

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[30] Altough the issues in *Georgia Power* concerned the application of state statutes of limitation to claims for backpay rather than to the bringing of suit, the same principle is controlling. The backpay claims in *Georgia Power* were raised prior to the effective date of the 1972 amendment that limited an award of backpay to no more than two years prior to the filing of a charge. The Fifth Circuit correctly held that application of the appropriate state statute of limitations (also two years) precluded an award of backpay to individual claimants prior to two years before the government suit was brought.

NLRB, like the EEOC an agency of the federal government, is not bound by statutes of limitations when seeking backpay. *Nabors* v. *NLRB*, 323 F.2d 686 (5th Cir. 1963); *J. H. Rutter-Rex Mfg. Co.* v. *NLRB*, 399 F.2d 356 (5th Cir. 1968), rev'd on other grounds, 396 U.S. 258 (1969). The Court thought this persuasive that the EEOC would similarly be immune from a time bar. The comparison, however, is clearly inapposite. The NLRB is a quasi-judicial body charged with the exclusive responsibility to prevent and redress unfair labor practices, and private individuals have no right independent of the NLRB to sue in court under the NLRA. An order of the NLRB determining liability and an appropriate remedy is judicially enforceable upon limited review by the courts of appeals for substantial evidence.[31]

The EEOC's role under Section 706 is significantly different. Unlike the NLRB, the EEOC does not have exclusive responsibility for the enforcement of Title VII. "The Commission cannot adjudicate claims or impose administrative sanctions. Rather, final responsibility for enforcement of Title VII is vested with federal courts." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). As already noted, the charging party is free any time after 180 days following the filing of the charge to bypass the EEOC's procedures and file an independent suit. If the EEOC does sue, the scope of its suit is limited to the predicate charge and matters reasonably related to it. Charging parties are permitted to intervene in an EEOC suit as of right,[32] "presumably to insure that they are satisfied with the conduct of the litigation to vindicate their rights." *EEOC* v. *Union Oil Co.*, 369 F. Supp. 579, 588 (N.D. Ala. 1974). None of

[31] 29 U.S.C. § 160; see Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261 (1940).

[32] Sec. 706(f)(1), 42 U.S.C. § 2000e-5(f)(1).

these restrictions on the authority of the EEOC are consistent with the concept of the public agency asserting a public right vested in it as a public body, as described in *Amalgamated Utility Workers* v. *Consolidated Edison Co. supra*; rather, the procedures the EEOC offers, including agency suit on behalf of the individual, are far more like a private administrative remedy to protect private rights. In fact, Congress deliberately withheld from the EEOC authority comparable to that of the NLRB, thereby evidencing an intent that the "public" authority vested in the former not be as pervasive as is vested in the latter.

Equally important, the delays complained of in both *Nabors* and *Rutter-Rex* occurred *after* the NLRB's determination as to the employer's liability had been confirmed by the Fifth Circuit but before the extent of that liability had been established. The situations in those cases are comparable to a district court's delay in formulating a remedial decree after full trial on the merits. In a district court, however, an employer would have the benefit of numerous procedural safeguards to ensure that the delay does not become too great. But the delay complained of in *Occidental* and *Griffin Wheel* occurred before suit was even brought, *before* the employer could even be fully aware of the scope of the charges that it would eventually have to defend. No procedural requirements exist to protect the employer from these pre-suit delays which accompany EEOC lawsuits.[33]

Thus, even though *Nabors* and *Rutter-Rex* both indicated that statutes of limitation will not apply to the NLRB, neither involved delay in the bringing of the

[33] Several courts have suggested that provisions of the Administrative Procedure Act provide a means by which an employer can protect himself from EEOC lethargy. See, *e.g.*, EEOC v. Moore Group, Inc., 416 F. Supp. 1002 (N.D. Ga. 1976); EEOC v. Metropolitan Atlanta Girls' Club, Inc., 416 F. Supp. 1006 (N.D. Ga. 1976); but see Chromcraft Corp. v. EEOC, 465 F.2d 745 (5th Cir. 1972), See also text at note 37, *infra*.

initial complaint before the ultimate fact-finder and hence neither provides any basis for analogy to the EEOC.

3. *The Ninth Circuit Erroneously Confused The Public Interest Served By An Award Of Backpay With The Public Interest In Suit Being Brought At All.*

In its opinion below, the court of appeals relied on this Court's decisions in *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), to show that suit under Title VII promoted a public interest sufficient to justify not applying the state statute of limitations. But the public interest that this Court found in *Moody* to be sufficient to permit an award of backpay despite a lack of bad faith on the part of the employer in no way addresses the issue whether the lawsuit was properly brought in the first place. The holding in *Moody* was specific: "[*G*]*iven a finding of unlawful discrimination*, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." 422 U.S. at 421 (emphasis added). *Franks* was similarly concerned solely with the extent of remedial relief available once a determination of liability has been made.

Nevertheless, the Court of Appeals herein placed substantial emphasis on the prophylactic purpose of Title VII and the deterrent effect established by the prospect of backpay liability. Such emphasis on the deterrent effect of backpay is misplaced, however, for the deterrent effect of the remedy is unaffected by a requirement that suit be brought in a timely fashion.[34] Indeed, *Moody* ex-

[34] While it may well be that the longer the EEOC delays in bringing suit, the greater the deterrent effect of "the reasonably certain prospect of a backpay award," Albemarle Paper Co. v. Moody, *supra*, 422 U.S. at 417, this Court surely did not mean to suggest that such delays actually serve the statutory purposes of the Civil Rights Act.

pressly held that relief for a violation of Title VII could be denied where "a *particular* cause has been prosecuted in an eccentric fashion, prejudicial to the other party . . ." 422 U.S. at 424. Not only does denial of relief in such circumstances "not offend the broad purposes of Title VII," but "[o]n these issues of procedural regularity and prejudice, the 'broad aims of Title VII' provide no ready solution." 422 U.S. at 424-25. Manifestly then, *Moody* recognized the applicability in a Title VII action of precisely the sort of considerations that underlie the judicial adoption of state statutes of limitations. On the other hand, none of the considerations evaluated in *Moody* or the NLRA cases cited by the Ninth Circuit support the notion that public policy requires the government's right to sue to last indefinitely. Rather, as demonstrated in Part II, *supra*, the public interest requires that government lawsuits on behalf of private individuals be subject to the same standards of fairness as are imposed on private suits seeking the same relief.

Because the interests served by application of a limitations period do not vary with the nature of the relief sought, there is no justification for distinguishing between injunctive and backpay relief in applying statutes of limitations. See *United States* v. *Georgia Power Co.*, *supra*, 474 F.2d at 922-24; *EEOC* v. *Griffin Wheel Co.* *supra*, 511 F.2d at 459. Unreasonable delay in bringing a suit prejudices an employer's ability to defend on the merits whatever the remedy. To the extent it might be thought less prejudicial to simply enjoin an employer from further unlawful practices than to award backpay, there is nevertheless no reason to do so on the basis of a stale charge. An employer who is presently discriminating may be the subject of a fresh charge by an indi-

vidual or by a member of the Commission itself. Such a practice represents a wholly satisfactory accommodation of the interests embodied in both Title VII *and* statutes of limitations.

The error of the Ninth Circuit below is thus plain: it confused the public interest in an effective *remedy* for employment discrimination with the equally strong public interest in having the lawsuit timely brought, so that the outcome of the litigation is determined on the merits, rather than the advantage that accrues to a plaintiff as time diminishes the defendant's ability to defend. As *Moody* evidences, consideration of the interests served by statutes of limitations is entirely appropriate in Title VII suits. Consequently, there is no legally sound reason that the normal rule requiring application of state statutes of limitations should not apply.

B. *The Practical Considerations Offered By The Ninth Circuit Do Not Support Rejection Of The Application Of State Statutes Of Limitations.*

At the close of its discussion of the limitations issue, the Court of Appeals below offered four "practical considerations" in support of its conclusion that state statutes do not apply to EEOC lawsuits. 535 F.2d at 540. None of those considerations withstands analysis, however. The court first suggested that application of often short limitations periods "would frustrate [the EEOC's] attempts to resolve disputes by means of administrative 'conference, conciliation, and persuasion.'" In fact, just the opposite is true. Under the current practice, an employer can be confident that, even if investigation by the EEOC reveals a violation of the statute, it will still be years before the EEOC brings a suit, if at all. This hardly encourages efforts to voluntarily correct the unlawful practices. The specter of a prompt investigation

and suit, on the other hand, provides a strong incentive to the employer to reach an amicable solution.[35]

The court also noted that "it would be cumbersome to determine the applicability of state limitations statutes according to the type of relief sought," referring to the possible separate treatment of backpay and injunctive claims. As already noted, however, the question whether the maintenance of a lawsuit on stale claims should be condoned does not turn on the nature of the relief sought. Where a legislative body has made a policy determination that suit after the passage of a certain number of years prejudices the defendant and disserves the public interest in the repose of claims, it is manifestly not unreasonable to reject the claims, whether for backpay or an injunction, since either would require a lawsuit the maintenance of which has been legislatively disapproved.

The court next stated that because backpay liability will not accrue from a date more than two years prior to the filing of a charge, "an employer need not produce past employment records except for the period of time the charge is pending, and the preceding two years." This is not only incorrect, it also demonstrates that the court completely misconceived the dilemma to the employer created by the court's ruling. The statutory limit on backpay liability is irrelevant to the keeping of business records necessary to prove or disprove the claim of discrimination itself. Moreover, the "period of time the charge is pending" may be many years,[36] requiring the employer to keep records for eight or more years solely for backpay purposes. But more important, the employer

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[35] That this is what Congress intended is further evidenced by the statutory provision permitting the court, in its discretion, to stay the lawsuit after it is filed for a period of sixty days pending further efforts by the EEOC to obtain voluntary compliance. Sec. 706(f)(1), 42 U.S.C. § 2000e-5(f)(1).

[36] See cases cited in notes 9-15, *supra*.

in many cases does not know until suit is finally brought precisely what records will be relevant. Because the scope of the lawsuit is tied to the scope of the investigation, not the charge, the employer cannot know until the determination is issued what the scope of eventual lawsuit may be, and this may itself occur long after relevant records have been lost.

Finally, the Court of Appeals suggested two factors that would operate "to minimize EEOC dalliance"; however, it is clear that neither provides an adequate substitute for application of limitations period. The court first suggested that "the charging party may demand a right to sue letter should the EEOC fail to obtain voluntary compliance or to sue within 180 days of the original filing." This is, of course, completely irrelevant. It is precisely the situation where no suit has been filed by anyone that gives rise to the need for application of a limitations period. Further, it has been the EEOC's practice not to inform the charging party of his right to sue until *after* it has determined that it will not bring suit, see EEOC Compliance Manual § 66.6, rather than immediately following further conciliation. It will be rare for a charging party to be sufficiently informed of his options for this possibility to provide the employer with any "protection" whatsoever. Finally, some courts have held that the EEOC may sue on the same charge that has already been the subject of an individual suit, reasoning that the statute protects only against simultaneous proceedings.

The court also suggested that "in extreme cases a federal district court could compel agency action" under the Administrative Procedure Act.[37] But the issue here is the bringing of a lawsuit, and it is extremely dubious to suggest that a court can order a government agency

[37] Sec. 6(a) and 10(e); 5 U.S.C. §§ 555 (b) and 706(1).

to institute such a legal proceeding. Moreover, it is absurd to put the employer in the position of having to go to court to compel the agency to bring suit against it.

Thus, the "practical considerations" offered by the Ninth Circuit are far more persuasive of the need for application of a limitations period than they are of its superfluity. They offer no justification at all for rejecting the general rule requiring a limitations period.

IV.

The Equitable Doctrine Of Laches Also Applies To EEOC Lawsuits.

Although the issue whether laches will apply to the EEOC was not raised below and therefore is not directly before the Court, full consideration of the questions that were presented requires that some brief comment on the role of laches be made. As many of the cases cited above (pp. 17-21) indicate, the same considerations that mandate application of state statutes of limitations to suit by the government also mandate application of the equitable doctrine of laches. *E.g.*, *United States* v. *Des Moines Navigation & Railway Co.*, 142 U.S. 510 (1892). It is equally clear, however, that even if the statute of limitations does not apply, laches may require dismissal of an EEOC suit.[38] In order to establish laches the defendant must show (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense. *Costello* v. *United States*, 365 U.S. 265, 282 (1961). This Court has already recognized that backpay can be denied to a private party where the suit was prosecuted in a manner that prejudiced the defendant. Such a result

[38] See EEOC v. Griffin Wheel Co., 511 F.2d 456, clarified, 511 F.2d 223 (5th Cir. 1975); United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973).

"does not offend the broad purposes of Title VII." *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 424. "On these issues of procedural regularity and prejudice, the 'broad aims of Title VII' provide no ready solution." *Id.*, at 425. The application of traditional equitable principles in such a situation not only does not conflict with Title VII, it provides the missing "solution" to the judicial problem.

It should not matter that in *Moody* the plaintiff was a private individual, rather than the EEOC, suing on behalf of the class. If it is determined that the defendant has been prejudiced by the plaintiff's unreasonable delay, no public interest is served if that prejudice is ignored when the plaintiff happens to be the government. And just as the prejudicial conduct of the litigation may justify denial of backpay relief, so too prejudicial conduct prior to the litigation should bar the lawsuit entirely. If that prejudice is in the form of a diminished ability to defend the charges on the merits due to the plaintiff's unreasonable delay, there is no less reason to bar the suit entirely if the plaintiff is the government than if the plaintiff is a private individual. The finding of prejudice compels the conclusion that the lawsuit will be unfair to the defendant.[39]

The application of laches will in no way interfere with the EEOC's responsibilities under Title VII. Laches will bar a suit only when the defendant demonstrates that the EEOC's delay or other conduct has so impaired his ability to present a defense that any resulting verdict will necessarily be tainted. The public interest in ending employment discrimination does not extend so far as to justifying finding violations by default.

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[39] See EEOC v. American National Bank, 420 F. Supp. 181 (E.D. Va. 1976); EEOC v. American Machine & Foundry, Inc., 12 EPD ¶ 11,200 (M.D. Pa. 1976); EEOC v. Moore Group, Inc., 11 EPD ¶ 10,886, on rehearing, 416 F. Supp. 1002 (N.D. Ga. 1976); EEOC v. C & D Sportswear Corp., 398 F. Supp. 300 (M.D. Ga. 1975).

Thus, application of the laches doctrine to suit by the EEOC under Title VII will disserve no legitimate public interest, but will in fact ensure that cases are tried on the merits rather than on unfair advantage. Accordingly, this Court should consider the laches doctrine as an integral part of the analysis here, and should conclude, for the reasons stated above, that laches is an applicable defense under Title VII.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

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